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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC., and SUNCREST FARMS, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, *Respondents*.

BRIEF OF THE STATE OF MINNESOTA, AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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Pursuant to Rule 42 (4) of the rules of this Court, the State of Minnesota respectfully tenders this brief, amicus curiae in support of the petition of Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc., petitioners herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eastern District of Pennsylvania is reported in 183 F. Supp. 80 (1960). The opinion of the United States Court of Appeals for the Third Circuit is printed in the Appendix herein at page 5a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 20, 1961. Jurisdiction of this Court is invoked under 28 U.S.C., § 1254.

QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. § 601 et seq. (hereinafter referred to as the Act), authorizes the Secretary of Agriculture to promulgate marketing orders regulating the minimum price that distributors may pay for milk sold in a regulated marketing area. The terms and conditions that may be included in any milk order are expressly limited by the provisions of 7 U.S.C. § 608c(5) and 7 U.S.C. § 608c(7) (J. A. 1a, 4a). Except as provided in 7 U.S.C. § 608c(5)(D), no marketing order may prohibit or in any manner limit the marketing, in a regulated marketing area, of milk or milk products produced in any production area of the United States. The questions presented are:

1. Whether, under § 8c(5) of the Act, 7 U.S.C. §8c(5), dairy farmers, engaged in the production of milk for sale in a regulated marketing area, may be denied the status of a "producer" and excluded from the benefits of the Act.

2. Whether § 8c of the Act, 7 U.S.C. § 608c, grants the Secretary of Agriculture authority to impose a charge on "nonproducer" milk, prohibiting or limiting the entry into a regulated marketing area of the milk of dairy farmers who produce milk for sale primarily in other marketing areas.

STATUTES AND ORDERS INVOLVED

1. The Agricultural Marketing Agreement Act of 1937, as amended, 50 Stat. 246, as amended, 7 U.S.C. § 601 et seq.

2. 7 C.F.R. § 927.1 et seq., regulating the handling of milk in the New York–New Jersey Federal Milk Marketing Area (hereinafter referred to as Order No. 27).

The relevant provisions of the foregoing statute and regulation appear in the Joint Appendix hereto at page 1a.

STATEMENT OF CASE

Section 8c(15)(A) of the Act, 7 U.S.C. § 608c(15)(A) permits a handler subject to an order to obtain administrative review thereof before the Judicial Officer of the Secretary of Agriculture. Judicial review of his decisions in the District Courts of the United States is authorized by § 8c(15)(B) of the Act, 7 U.S.C. § 608c(15)(B).

Petitioners instituted review proceedings before the Judicial Officer of the Secretary of Agriculture to challenge the validity of provisions of Order No. 27 requiring "non-pool handlers" to make "compensatory payments" on "nonproducer" milk distributed in the marketing area encompassed by the order. The hearing examiner filed his Recommended Report invalidating the challenged provisions. The Secretary of Agriculture excepted to the Report, and, following

argument before the Secretary's Judicial Officer, the decision of the hearing examiner was reversed and the questioned provisions were ruled lawful.

Petitioners sought judicial review in the United States District Court for the Eastern District of Pennsylvania. On the authority of *Kass v. Brannan*, 196 F. 2d 791 (2nd Cir. 1952), certiorari denied, 344 U.S. 891, the District Court invalidated the challenged provisions, holding that Order No. 27 did not comply with § 8c(5)(A), 7 U.S.C. § 608c(5)(A), and was unauthorized by the Act. That section requires that the prices paid by handlers for each class of milk "shall be uniform as to all handlers."

On appeal by the Secretary of Agriculture, the United States Court of Appeals for the Third Circuit reversed the decision of the District Court, rejecting the holding and reasoning of *Kass v. Brannan*, supra (J. A. 9a).

Under a milk order, handlers (or dealers) pay for milk according to the use for which the handler disposes of it, i.e., according to "use classification." Milk sold for fluid use (Class I milk) has the highest use value; the surplus that cannot be sold in fluid form must be processed into manufactured products (Class III in Order No. 27) and has the lowest use value. The price for each class use is fixed by the Order. The producer supplying the handler, however, is paid neither the Class I nor the Class III price, but rather a "blend" or "uniform" price based upon marketwide pooling of all handlers' receipts and sales in accordance with the provisions of § 8c(5)(B)(ii), 7 U.S.C. § 608c(5)(B)(ii). The "blend" price is derived by multiplying the total amount of milk disposed of by all handlers in the market in all classes by the established price for each

class. The product of that multiplication, divided by the total quantity of milk sold in the market, yields the "blend" or "uniform" price paid to producers located at a fixed distance from the market center. Location differentials above or below the minimum price, (§ 8c(5)(A)(ii)), allow for the cost of transportation to the market. "The purpose of the differentials is to make it possible for handlers to procure milk throughout the supply area at a delivered cost that is uniform with that of other handlers."[1]

Since § 8c(5)(A) of the Act requires uniformity of class price among handlers, some handlers will pay into a "producer settlement fund" the amount by which their total purchases, classified according to use and multiplied by the price for each class, is greater than that total multiplied by the "blend" price. If, on the other hand, a handler's total volume of milk purchases, classified according to use, when multiplied by each class price, is less than the amount obtained by mutiplying his total receipts by the "blend" price, then the "producer settlement fund" pays such handler the difference to permit him to pay his producers the "blend" price, in accordance with § 8c(5)(C) "to the end that total sums paid by each handler is equal to the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this section."

Order No. 27 distinguishes and defines the terms "dairy farmer" and "producer," limiting the latter term to a dairy farmer, engaged in the production of milk for sale in the marketing area and whose milk is delivered to a plant that

[1] *Regulations Affecting the Movement and Merchandising of Milk*, Marketing Research Report No. 98, p. 61 (1955). The price actually received by producers varies inversely with their distance from the market center.

distributes in the regulated area, at least 50% of all milk received from all dairy farmers.[2] Under the terms of the order, only "producers" are entitled to participate in the "producer settlement fund" and, through that device, to receive the "blended" minimum price established in the marketing area.

Dealers who distribute in the regulated marketing area the milk of "nonproducer" dairy farmers are required by § 927.83 of the order to pay a charge on each volume of such milk into the producer settlement fund for distribution among "producers." Petitioners distribute approximately 5% of their total plant receipts in the marketing area, the remainder of their sales being made in contiguous or adjacent areas in Pennsylvania. As a result, the dairy farmers supplying petitions are not "producers" under the definition of Order No. 27.

Petitioners are regulated under Philadelphia Federal Milk Order No. 61 and the Pennsylvania Milk Control Board. Dairy farmers supplying petitioners are paid for their milk at a price equal to or higher than the price fixed by Order No. 27. (See Petition, p. 8.)

The challenged provisions require petitioners to pay into the producer settlement fund for distribution among "producers" a charge or "compensatory payment" measured by the difference between the Class I and Class III price established by Order No. 27, multiplied by the total volume of milk distributed by petitioners in the marketing area regulated by Order No. 27. The amount of the payment represents approximately five to six cents per quart for each quart so distributed. It is designed either to exclude such

[2] Such a plant is referred to as a "pool plant" as distinguished from a "non-pool plant."

milk from the market or to compensate "producers" for the loss of fluid milk sales resulting from the entry of petitioners' "nonproducer" milk.

In *Kass v. Brannan*, supra, the Second Circuit viewed compensatory payments as a means only to protect the price structure of the regulated market against the competitive sales advantage that a handler might obtain by substituting cheaper outside milk. The Court below, in rejecting *Kass*, decided that "stabilizing the producers' market on the regional level" was "the ultimate goal of the Act" (J. A. 13a) and rejected as irrelevant the price paid by petitioners to their dairy farmers. On that assumption, compensatory payments were held valid as an appropriate device designed to retain a market for regional producers against the intrusion of outside dairy farmers.

INTEREST OF THE STATE OF MINNESOTA

Minnesota ranks second among the states in total milk production.[3] The annual farm cash receipts from marketing of all milk and cream amounted in 1960 to approximately $300,000,000.[4] Of this total production, only about 15% can be consumed within the state as milk, cream, butter, dry milk and other dairy products. The remaining 85% must be marketed in the channels of interstate or foreign trade.

In 1960 dairy farmers in the United States received an average price of $4.17 per hundredweight for all milk and cream marketed.[5] The Minnesota average was $3.07 per

[3] *Milk Production, Disposition and Income*, United States Department of Agriculture, Statistical Reporting Service, April 1961.

[4] Id.

[5] Id.

hundredweight for milk marketed in all forms. While ranking second in terms of total production, Minnesota ranks fifth in terms of gross income from dairying. The disparity may be emphasized by the fact that Florida produces only one-ninth as much milk as Minnesota but receives for that milk almost one-third of Minnesota's total income from dairying.

There are over 35 major markets in the United States where the price of milk for bottling purposes exceeds the price paid by dealers in Minnesota by more than the cost of transportation to those markets.[6] Such markets are not responsive to price competition because of intermarket barriers which take the form of restrictive sanitary regulations, state milk control laws and certain provisions of federal market orders.[7]

Barriers to market entry deny Minnesota milk producers a substantial market for fluid milk and compel the diversion of such milk into lower valued manufacturing uses. Such barriers permit those within the protected area to ignore alternative sources of supply and extract a monopoly price from consumers. The excess production induced by high fluid milk prices within such markets is diverted into manufactured products and dumped onto the national market, thus depressing the value of manufacturing milk.

Federal milk order restrictions such as those challenged here are cumulative in their adverse effect on Minnesota's dairy industry. Similar restrictive provisions, when applied

[6] Fluid Milk and Cream Report, United States Department of Agriculture, March 1961.

[7] See, e.g., *Regulations Affecting the Movement and Merchandising of Milk*, United States Department of Agriculture, Marketing Research Report No. 98 (1958).

to the approximately 80 federal market orders affecting over two-thirds of the total volume of milk consumed in urban areas in this country, restricts the movement of fluid milk between the several production areas of the United States, unduly enhance prices within those protected areas, lower consumption and result, cumulatively, in uneconomic surplus disposal of fluid milk into manufacturing uses.[8]

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is in direct conflict with a decision of the Court of Appeals of the Second Circuit.

The question in this case is whether certain provisions of the New York–New Jersey Milk Marketing Order, 7 C.F.R. § 927.1 et seq., referred to as Order No. 27, are within the statutory authority granted to the Secretary of Agriculture by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 et seq.

The decision of the Court below holds that under the Act, where a dealer handles milk produced by dairy farmers for sale primarily in another market, the Secretary has the power to prevent such milk from entering a regulated marketing area and displacing therefrom the fluid milk sales of the market's "primary producers."

Petitioners' milk, purchased from dairy farmers in Pennsylvania, was paid for in accordance with prices established by the Pennsylvania State Milk Control Commission and Federal Order No. 61. It is undisputed that their acquisi-

[8] M.S.A. § 8.13 (Supp. 1958) directs the Attorney General to combat trade barriers relating to dairy products.

tion cost was equal to or higher than the comparable Class I price paid by handlers to producers in Order No. 27. The Court below held, nonetheless, that the compensatory payment of approximately five and one-half cents a quart required by 7 C.F.R. §§ 927.83, 927.84 was authorized as a measure "designed to compensate the pool for the loss of Class I fluid milk utilization and [to] protect the uniform blend price in the marketing area." (J. A. 10a) With respect to the requirements of § 8c(5)(A) that "minimum prices for each * * * use classification which all handlers shall pay * * * shall be uniform as to all handlers * * *", the Court below said that the section did not require equalized cost "between pool handlers or between pool and nonpool handlers." (J. A. 13a)

In *Kass v. Brannan*, 196 F. 2d 791, (2nd Cir. 1952), certiorari denied, 344 U.S. 891, it was held that the provisions of Order No. 27 imposing "compensatory payments" on a dealer with respect to "outside milk" distributed in the New York marketing area were not authorized by the Act. The Court found that the "penalty", when added to the dealer's actual cost, resulted in a "price discrimination between a handler who purchases nonpool milk products and one who purchases pool milk products, although each makes the same use of such products in the New York marketing area." 196 F. 2d at p. 796. Such a lack of uniformity, the Court found, contravened § 8c(5)(A) of the Act.

The Court below squarely rejected *Kass v. Brannan*, stating: "We cannot agree with the holding." (J. A. 9a)

The two decisions adopt inconsistent and irreconcilable views of the purposes of § 8c of the Agricultural Marketing Agreement Act of 1937. Adopting the reasoning of the Third Circuit, only those producers primarily associated with the

regulated marketing area would be permitted to supply it, since the compensatory payment required is measured to result in total exclusion. It assumes that the "ultimate goal of the Act" is to stabilize "the producer's market on the regional level." (J. A. 13a) The *Kass* decision, on the other hand, would exclude "outside" producers' milk from a regulated market only to the extent that its entry would give a handler in the market a competitive price advantage and thus break down the pricing structure established under the Order.

2. The case involves a substantial federal question of importance beyond the interests of the parties involved.

Resolution of conflict in the decisions of the Second and Third Circuits is imperative to the proper administration of the Act. The Department of Agriculture has promulgated approximately 80 federal orders affecting over two-thirds of the total volume of milk consumed in urban areas in the United States.

The matter is important beyond the interest of the parties to this case. The public interest in the cost of milk supplies, and the interest of producers in freedom of access to markets requires a decision on the question presented by the petition. Milk marketing arrangements, lawful under the Agricultural Marketing Agreement Act, would be unlawful under the anti-trust laws, but for the exemption provided in § 8b of the Act. *United States v. Borden Co.*, 308 U.S. 188. Absent a lawful federal milk order, it is unreasonable *per se* for milk producers to foreclose competitors by agreement, from any substantial market. *Maryland-Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458.

Where a marketing area is protected either by sanitary or economic barriers, artificially high prices may be maintained. The excess production thereby induced burdens the national economy because the Secretary of Agriculture is required by law to support the price of milk at levels between 75 and 90 percent of parity by purchase and withdrawal from the market of the product of that surplus production. 7 U.S.C. § 1446 (C).

The purpose of the Act is to raise and stabilize producer prices by encouraging interstate commerce in agricultural products. 7 U.S.C. § 601, and see *Hood & Sons v. Dumond*, 336 U.S. 525, 545. The challenged provisions of Order No. 27 and similar provisions in other federal orders[9] impede inter-area commerce and discriminate against major producing areas of the United States.

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[9] See, e.g., recent hearings on proposed federal order for Washington, D.C. Marketing Area wherein the Secretary, in recommending the establishment of a regulated market, stated at 23 Fed. Reg. 3721: "Because of the distances that eastern fluid markets are from areas of alternative supply in the Midwest, the price for milk for fluid uses in eastern markets is higher in relation to manufacturing milk values than is the case in the Midwest. Under such circumstances there might be an incentive for dealers in unregulated adjacent markets to seek a Class outlet in the Washington market for temporary or seasonal surpluses in excess of their local market needs. Because of the substantial number of Government installations in the area which procure their milk supplies on a competitive bid basis for relatively short periods there is a considerable opportunity, unless appropriate safeguards are provided, for such unregulated dealers to market milk excess to their local needs at prices below the value of milk for fluid uses. They may do this by bidding off available contracts at such Government installations. This situation would be a serious disruptive factor to orderly marketing in the Washington marketing area. *It is essential, therefore, that the order be constructed in a manner which will safeguard the market from serving as a surplus disposal area for surrounding markets.*" (Emphasis added.)

3. The decision of the Court below is erroneous.

The purpose of § 8c of the Act is to maintain reasonable prices for milk producers by promoting orderly marketing conditions. 7 U.S.C. § 602, *U. S. v. Rock Royal Coop.*, et al., 307 U.S. 533. The constitutional power of a state to regulate the pricing of milk was established in *Nebbia v. New York*, 291 U.S. 502. That case recognized that unequal acquisition costs among handlers in a market results in "price cutting and other forms of destructive competition," 291 U.S. at p. 518, leading finally to a deterioration in producer prices.[10] Where the price paid to milk producers is fixed by law it is necessary, to avoid discrimination among competing handlers, that the price for each class of milk be uniform among all handlers in the same market. 7 U.S.C. § 608c(5)(C).

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[10] • • • "A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations), can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price, to his own and the producer's detriment.

"Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned *so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.*" (Emphasis added.) 291 U.S. at p. 517.

Classified pricing under state regulation failed when this Court held in *Baldwin v. Seelig*, 294 U.S. 511, that New York was powerless to exclude from its markets "milk paid for in Vermont below the New York minimum." 294 U.S. at p. 524. Because of that limitation on state power, Congress adopted the Agricultural Marketing Agreement Act of 1937 as amended. *U. S. v. Rock Royal Coop.*, et al., supra. So long as milk entering a regulated market has been priced equally to competing handlers, nothing in § 8c of the Act, expressly or impliedly, authorizes the Secretary of Agriculture to exclude it. *Kass v. Brannan*, supra.[11]

The decision below is grounded on the wholly erroneous premise that the regional marketing scheme (J. A. 12a) authorizes, nay requires, preferred treatment for regional producers.[12]

In *Kass*, the Court clearly recognized that the Secretary was authorized by § 8c of the Act to limit the entry of milk

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[11] Not even dissenting opinion by Judge Learned Hand disputes that proposition: "What orders, short of prohibition or limitation, the Secretary might adopt to protect the new system of 'pool plants' which he had set up, it was certainly for him to say within the limits of his statutory powers. One method might have been to restore to the producers in a 'pool' what they had lost by the 'non-pool' competition of each handler; *but that was patently impossible to determine, and nobody suggests that it should have been attempted.* Another method was to impose upon a 'non-pool' handler the same cost that 'pool' handlers must pay, thus eliminating any inducement to poach, so to say, upon the local 'pool'. The provisions in suit were promulgated to effect this purpose; and I shall assume that they can be defended only on that ground. * * *" 196 F. 2d p. 798.

[12] "The establishment of the Act on a regional marketing basis necessitates differentials between pool and non-pool handlers. The Secretary of Agriculture following the letter and spirit of the statute has implemented this concept." (J. A. 12a)

into a regulated market only to the extent that its entry would destroy the price structure in the market. *Daily Farm Dairy Co. v. Anderson*, 157 F. 2d 87 (8th Cir., 1946), does not hold to the contrary. That case involved an individual handler pool rather than a marketwide pool.[13] Hence there was no equalization or Producer Settlement Fund to be concerned with. The facts were that handlers in St. Louis were purchasing "outside" milk for fluid use at a price lower than the St. Louis order price. The Court held that the provision in the St. Louis order limiting the entry of lower priced outside milk was authorized by the Act.

Both the language of § 8c and its legislative history supports the holding of the *Kass* case and opposes the decision of the Court below. Sec. 8c(5) of the Act expressly limits the provisions of a market order to the terms and conditions in §§ 8c(5) and 8c(7) and "no others." Sec. 8c(5)(G) provides:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

Paragraph (g) of § 8c(5) is known as the Andresen amendment and was placed in the bill prior to enactment into law at the insistence of Representative August Andresen of Min-

[13] In an individual handler pool, each handler in the market pays *his producers* a blend price determined by the handler's own use in each class rather than the marketwide use. See § 8c(5)(B)(i).

nesota who was fearful lest the Secretary be given the power to establish trade barriers in milk and dairy products.[14]

The purpose and intent of § 8c(5)(G) was explained by Justice Jackson in *Hood & Sons v. Dumond*, 336 U.S. 535. In that case the State of New York had denied Hood a permit to buy additional milk supplies from New York producers for shipment into the Boston area. The grounds for denial were to protect and advance local economic interests. New York's regulatory scheme was similar in plan and purpose to the federal Act. It contended that "• • • such restraint or obstruction as its order imposes on interstate commerce does not violate the Commerce Clause because the state regulation coincides with, supplements and is part of the federal regulatory scheme. • • •" 336 U.S. 525, 540. In rejecting this argument Justice Jackson said at pages 543-545:

> "When it is considered that the federal Act was passed expressly to overcome 'disruption of the orderly exchange of commodities in interstate commerce' and conditions found to 'burden and obstruct the normal channels of interstate commerce,' 7 U.S.C., § 601, it seems clear that we can not sustain the State's argument that its restrictions here involved supplement and further the federal scheme.

[14] 79 Cong. Rec. 9462, 9572 and 13022. At p. 9462: "Mr. Andresen: 'Is there anything in the milk section of the bill which gives the Secretary authority to set up trade barriers and stop the free flow in commerce throughout the United States of dairy products?'

"Mr. Jones: 'No. There is nothing in that bill that would authorize that. The Secretary may require that in crossing from one region to another that they comply with the same conditions which the farmers and distributors comply with in that region.' • • • but he cannot set up any trade barriers which would keep them out. • • •"

"Moreover, we can hardly assume that the challenged provisions of this order advance the federal scheme of regulation because Congress forbids inclusion of such a policy in a federal milk order. Section 8c(5)(G) of the act provides:

> "'No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.'

"While there may be differences of opinion as to whether this authorizes the federal order to limit, so long as it does not prohibit, interstate shipment of milk, see Baily Farm Dairy Co. v. Anderson, 157 F. 2d 87, 96; Baily Farm Dairy Co. v. Jones, 61 F. Supp. 209, 221—a question upon which we express no opinion—it is clear that the policy of the provision is inconsistent with the State's contention that it may, in its own interest, impose such a limitation as a coincident or supplement to federal regulation.

"The only federal restriction of handlers' purchases from new producers, found in § 8c(5)(B) [sic],* authorizes inclusion, in orders concerning milk or milk products, of a clause providing that for deliveries made during the first sixty days a new producer shall be paid only the minimum price applicable for milk of the particular use classification, subject to adjustments not relevant here. This provision was included in the 1935 amendment, 'to prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market * * *.' S. Rep. No. 1011, 74th Cong., 1st Sess., p. 11. And it was added, 'This is the only limitation upon the entry of new producers—wherever located—into a market, and it can remain effec-

*8c(5)(D)

tive only for the specified * * * period.' Ibid. The bill originally provided for a ninety-day minimum price period but in conference the less restrictive sixty-day period was adopted. H.R. Rep. No. 1757, 74th Cong., 1st Sess., p. 21.

"These sections and reports indicate that it is the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk. * * * The purpose as expressed in § 1, 7 U.S.C. § 601, is to avoid conditions which burden and obstruct the normal channels of interstate commerce. The object of the federal program to raise and stabilize the price of products was to stimulate interstate commerce. The order of the Commissioner avows itself to have the opposite effect. It can claim neither federal sponsorship nor congressional sanction."[15]

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[15] 79 Cong. Rec. 13022 (1935). Debates on Conf. Rep. H. R. No. 1757, 74th Cong. 1st Sess., at p. 13022. Mr. Jones: "The provisions of this particular bill would enable that area to be protected from being swamped with fluid milk from the outside, bought at any old price. For instance, if you do not have the protection of this bill they would run into the same trouble they ran into in the New York milk cases, where they went into New Hampshire and bought milk at a lower price and came in and broke down your milk agreements. Under the provisions of this bill if a price was fixed in this particular area in New York, then if anyone bought milk from an outside area and brought it in he would be compelled to pay the producer the same price that was being paid the producers within the area and comply with all regulations and requirements of that area. For the first 2 months he would be required to take the manufacturer's price."

CONCLUSION

The sole statutory basis for the challenged provisions is asserted by the government and the Court below to rest in § 8c(7)(D) of the Act. The exclusionary provisions, it is claimed, are necessary for the administration of the Act. This Court has recently held that administrative necessity cannot authorize an exercise of power withheld by Congress. *Denver Stockyard Co. v. Producers Live Stock Marketing Association*, 356 U.S. 282, 298. There, the Court struck down regulations sanctioned by the Secretary of Agriculture under the Packer and Stockyard Act, 7 U.S.C. § 181 et seq. The regulations complained of gave the Denver Stockyard Company a monopoly in the marketing of all livestock produced "within the normal marketing area" of the Denver yard. This Court found that the plain words of the Act prohibited the discriminatory regulations that would have permitted stockyard owners to compel marketing agencies to enter into exclusive dealing arrangements, stating "[i]f the Act does not fit the present economics of the business, a problem is presented for the Congress."

The challenged provisions of Order No. 27 are designed, avowedly, to exclude from the market "outside producers." Sec. 8b exempts from the coverage of the antitrust laws *authorized* marketing agreements entered into under the Act, but the narrow price fixing and market exclusion devices permitted by §§ 8c(5)(A) and 8c(5)(D) should not be permitted, by an arrogation of power, to be extended to accomplish a purpose uniformly condemned as contrary to public policy. *Maryland-Virginia Milk Producers Association, Inc. v. U. S.*, 362 U.S. 458; *U. S. v. Borden Co.*, 308 U.S. 188.

For the foregoing reasons the State of Minnesota urges at the Petition for a Writ of Certiorari be granted.

Respectfully submitted

WALTER F. MONDALE
Attorney General
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Attorneys for the State of Minnesota, Amicus Curiae

APPENDIX A

Statute Involved

§ 608c . . . . .

(5) MILK AND ITS PRODUCTS; TERMS AND CONDITIONS OF ORDERS.

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices *shall be uniform as to all handlers*, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. (Emphasis added.)

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk, produced for market during such period; the

approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at

the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contracts between the association and its producers; *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * * *

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * * * *

(D) Incidental to, and not inconsistent with the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order."

APPENDIX B

Opinion of the Court

(Filed February 20, 1961)

By McLAUGHLIN, *Circuit Judge*.

The prime issue presented by these appeals is whether certain provisions of New York–New Jersey Milk Marketing Order, 7 C.F.R. § 927.1 et seq., (hereinafter referred to as Order No. 27), requiring all non-pool handlers of milk, to make a "compensatory payment" to the Producers Settlement Fund for all non-pool fluid milk distributed by them in the marketing area, 7 C.F.R. §§ 927.83, 927.84, contravenes the Agricultural Adjustment Act of 1933, as amended by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 et seq.

Docket No. 13,289, is an enforcement action brought by the United States pursuant to § 8a (6) of the Act, 7 U.S.C. § 608a (6), to require Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc., to make the compensatory payments required by the order. Dockets Nos. 13,290 and 13,291, are actions by the Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc., respectively, to obtain judicial review of decisions of the Judicial Officer in the United States Department of Agriculture pursuant to § 8c (15) of the Act, 7 U.S.C. § 608c (15) (B). The Judicial Officer held that the contested provisions for compensatory payment were valid.

In the district court, all three actions were consolidated for trial.[1] In its opinion reported in 183 F. Supp. 80 (1960), that court, although finding the provisions for compensa-

[1] In Docket No. 13,289, pending final outcome of the cases, the district court ordered that the compensatory payments be paid into the registry of the court, and enjoined Lehigh from further violating Order No. 27.

tory payments supported by the record and "incidental to * * * and necessary to effectuate the other provisions of such order," invalidated them under the authority of the majority holding in Kass v. Brannan (Judge Learned Hand dissenting), 196 F. 2d 791 (2 Cir. 1952).[2] The court noted however:

> "Although we are not compelled to accept that Court's decision under the concept of *stare decisis* as it applies to Federal Courts and although we might have reached a contrary result if initially called upon to interpret § 608c (5), we do not feel justified in now rejecting the interpretation there placed upon § 608c (5) (A) and upon the earlier version of Order No. 27. That Court's opinion is always entitled to great weight."

The primary policy of Congress in enacting the Federal Milk Control program and particularly Order No. 27, applicable in the case at bar,[3] was "* * * to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices * * *." 7 U.S.C. § 602 (1) (1952). Regarding milk, the plight of the farmers (referred to as producers in the milk industry) was caused by the fierce competition to procure the most lucrative market for it. Since fluid milk brought the highest return to the producer and cream or milk product utilization was less rewarding, the rivalry was for that market. To alleviate the

[2] Specifically the district court stated:

"* * * in light of the *Kass v. Brannan* decision, *supra*, the Order as promulgated did not comply with Section 608c (5) (A) of the Agricultural Marketing Agreement Act, 7 U.S.C.A., in that the prices were not uniform as to *all* handlers and in particular as to these two plaintiff handlers. Therefore, that part of the Order requiring compensatory payments to the Producers Settlement Fund by them must be stricken down."

[3] For a more detailed discussion of the Order and the problems of the milk industry, see Nebbia v. New York, 291 U.S. 502 (1934); United States v. Rock Royal Co-op., 307 U.S. 533 (1933).

harsh effects of that struggle on producers, Congress enacted the governing law vesting the Secretary of Agriculture with broad regulatory powers. Pursuant to the statutory authorization, the Secretary of Agriculture has promulgated regional milk orders based on a system of milk pooling. Those orders, with their programs of classification and reporting, are geared to provide the producer in the specified marketing area with a uniform price for all milk delivered by him for processing, irrespective of the particular use to which it is ultimately put.

This is accomplished by the following method. Under Order No. 27 milk utilization is classified into three fundamental groups: Class I (fluid milk); Class II (cream); Class III (milk products, butter, cheese, etc. * * *). The Market Administrator fixes a price for each class. He then determines from reports filed by the handlers the volume of milk used in each classification throughout the marketing area. From those figures, the Administrator computes the value of all milk used in the Marketing Area by multiplying the market volume figure in each class by the class price. After adding the totals and making certain additions and or subtractions not relevant here, he divides that figure by the aggregate volume of milk of all classifications used in the Marketing Area, to determine the uniform blend price which is paid to all producers, regardless of the utilization of their milk. Since each handler's use of the milk received from producers would not average out to the uniform blend price, a Producers Settlement Fund was created. This fund is contributed to by those handlers whose total class utilization price of the milk exceeds the uniform blend price and is drawn upon by those handlers whose total class utilization price of the milk is less than the uniform blend price. Thus, although the producer receives the uniform blend price regardless of the utilization of his milk, the handler must account to all other handlers through the Producers Settlement Fund for the price of his actual use of the milk purchased by him.

Lehigh and Suncrest are not fully regulated handlers, the largest part of their milk business being outside the marketing area. However, since a certain percentage of their outlets for milk (approximately 5%) are in the marketing area, they are subject to the compensatory payment provisions of Order No. 27, 7 C.F.R. §§ 927.83, 927.84, which provide that where a non-pool handler distributes milk for Class I utilization in the marketing area, he must pay into the Producers Settlement Fund a compensatory payment measured by the difference between the Class I and Class III price.

Lehigh and Suncrest attacked this provision and were sustained by the district court on the authority of Kass v. Brannan, supra. That case held that mandatory compensatory payments imposed upon non-pool handlers for fluid milk distributed in the marketing area were, "* * * inconsistent with the terms and conditions specified in section 8c (5) (A) * * *." That section reads as follows:

> "Milk and its products; terms and conditions of orders.
>
> (5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."

To reach its conclusion, the court in Kass compared the cost of the milk to pool handlers with that of non-pool handlers. It stated that although the cost to a pool handler is the class price, a non-pool handler's cost is composed of two items, the amount it pays the seller and the amount of the compensatory payment. The court decided that since the payment is based on the difference between two class prices without taking into account the initial cost to the handler, the result is a disparity between the non-pool handler's total cost and the pool handler's total cost which violates the uniformity provision of Section 8c (5) (A) of the Act. We cannot agree with the holding.[4]

The Kass opinion assumes that the minimum class price provision of Section 8c (5) (A) is designed to equalize the actual costs of milk to all handlers distributing milk in the marketing area. And Lehigh and Suncrest assert in their brief:

> "The result sought to be achieved by Congress in this section [8c (5) (A)] was that through the device of class prices *all handlers' costs for milk utilized in the marketing area should be uniform* so that no one group of handlers could enjoy an unfair advantage or suffer an unfair disadvantage." (Emphasis supplied.)

This interpretation misconceives the plain language of the section and suggests a policy not contemplated by Congress.

Section 8c (5) (A) of the Act makes no reference to equalizing neither fully regulated or partially regulated handlers' costs. It provides solely for uniform minimum class prices for which the pool handlers must account to the Producers Settlement Fund. Nor does it take account of the initial cost of milk to handlers. As has been recognized by the Supreme

[4] We note that a recent case in the District Court of Connecticut, Knudsen Brothers Dairy, Inc. v. Benson, Civil No. 8145 (D.C. Conn. July 19, 1960), followed the mandate of its circuit as set forth in the Kass opinion. As it adds nothing to the conclusion in Kass it will not be discussed.

Court, Section 8c (5) (A) does not prevent the pool-handler from paying a premium to producers for milk over and above the uniform blend price. However, his accountability to the Producers Settlement Fund would still be measured by the use class prices fixed by the Market Administrator under Section 8c (5) (A). Stark v. Wickard, 321 U.S. 288, 303 (1944). These latter prices are based on the use value of the milk. Neither fully regulated nor partially regulated handlers' initial costs are involved. Lawson Milk Company v. Benson, 187 F. Supp. 66, 73 (N.D. Ohio 1960).

Moreover to *imply* the thought urged by Lehigh and Suncrest as the motivation behind Section 8c (5) (A) and thereby measure the compensatory payment by using the Kass formula of equalized actual costs, would be repugnant to the *express* purpose set forth in the Act itself, i.e., regional regulation to secure a stable market and parity prices for producers. To illustrate: If a non-pool handler's initial cost was the Class I (fluid milk) price, he could, under the principle of the Kass case, distribute milk in the marketing area in any volume without accounting to the Producers Settlement Fund or making a compensatory payment. If his initial cost was greater than the Class I (fluid milk) price, the same result would occur. If his initial cost was slightly less, his compensatory payment would be a token one.

It is evident that in all three illustrations, employment of the Kass theory to measure compensatory payments would impair the integrity of the regional marketing scheme, since the compensatory payments would bear no relation to the loss of the Class I fluid milk utilization in the marketing area. In contradistinction, the payments provided for in Order No. 27, complement the regional marketing idea. They are designed to compensate the pool for the loss of the Class I fluid milk utilization and they in turn protect the uniform blend price in the marketing area. We cannot, as urged by Lehigh and Suncrest, reasonably impute to Con-

gress a policy in one section of the Act that would directly conflict with the comprehensive regulatory undertaking of the complete Act as conceived by Congress.[5]

We are also convinced that, in the light of the structure and avowed purpose of the Act, Section 8c (5) (A), has no application to non-pool handlers. Lehigh and Suncrest would have it that the Act makes no distinction between pool and non-pool handlers and that therefore the provision of Section 8c (5) (A) which states: "Such price shall be uniform as to all handlers," guarantees them a cost equal to that of pool handlers.[6] But there is not the slightest indica-

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[5] Examination of the Kass opinion on its own facts reveals that Kass was a *handler* who purchased cream and condensed milk from another handler. Pursuant to Section 927.9(h) of Order No. 27, Kass was charged compensatory payments on the cream measured by the difference between the Class II-A and Class IV-A price and on the condensed milk measured by the difference between the Class II-B and Class IV A price. Clearly Section 8c (5) (A) has no application in such a situation. It only contemplates minimum class prices which *handlers* shall account to the pool for on milk purchased from *producers*. It makes no reference to situations where *handlers* purchase milk from other *handlers*. Even if it could be said that it was designed to limit the imposition of compensatory payments at all, and we hold that it was not, it would be applicable solely to handler-producer transactions, and not to handler-handler transactions. Lawson Milk Company v. Benson, 187 F. Supp. 66, 70-71 (N.D. Ohio 1960); see also, dissenting opinion of Judge Learned Hand in Kass v. Brannan, 196 F. 2d at 799.

[6] As a matter of statutory construction if we were to adopt the theory of Lehigh and Suncrest and thereby include non-pool producers within the ambit of the term "producers" in Section 8c (5) (A), the provisions of the next section, 8c (5) (B), which requires payment of the uniform blend price to "producers," would also be applicable to Lehigh and Suncrest. In effect, the Market Administrator would have the choice of either imposing full regulation on Lehigh and Suncrest or no regulation at all. So limiting the discretion of the Market Administrator is inconsistent with the tenor of the entire act and contrary to the accepted judicial interpretation of its terms. See, e.g., Queensboro Farms Products v. Wickard, 137 F. 2d 969, 977 (2 Cir. 1943); Bailey Farm Dairy Co. v. Anderson, 157 F. 2d 87, 94-95 (8 Cir. 1946).

tion that Congress used the language of Section 8c (5) (A), with the thought of providing for equalized costs between pool and non-pool handlers and thereby stifling the effectiveness of the whole plan. "An elaborate enactment like this, devised by those who know the needs of the industry and drafted by legislative specialists, is to be treated as an organism. Every part must be related to the scheme as a whole."[7] This was acknowledged early in the history of the Act by the Supreme Court when it held that agency cooperatives were subject to the Act even though they did not technically purchase the milk of their producers. United States v. Rock Royal Co-op., 307 U.S. 533 (1938). See also Bailey Farm Dairy Co. v. Anderson, 157 F. 2d 87, 95 (8 Cir. 1946).

The Act does not attempt nation-wide regulation, but rather "* * * authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable." United States v. Rock Royal Co-op, supra at 576. "The Act recognizes that the factors which affect the problem vary in different production and marketing areas and that the question therefore is one that must be dealt with regionally on the basis of the particular conditions." Baily Farm Dairy Co. v. Anderson, supra at 90. This establishment of the Act on a regional marketing basis necessitates differentiation between pool and non-pool handlers. The Secretary of Agriculture following the letter and spirit of the statute has implemented this concept. He has conducted hearings and investigations to determine the need in certain regions for Milk Marketing Orders, and where called for has promulgated them. The pool handlers under those Orders are subject to full regulations. They must report to the Market Administrator in the region, must pay the uniform blend-price to producers and must account to the Producers Settlement Fund for their actual utilization of the Milk. The non-pool handlers are not subject to full

[7] Frankfurter, J., in Stark v. Wickard, 321 U.S. 288, 311, 315 (1944) (dissenting opinion).

regulation, are not required to pay the uniform blend price to their producers and do not have to account to the Producers Settlement Fund for their utilization of the Milk. Absent the compensatory payments, they are unfettered as to price, market and amount of distribution.[8]

The aim of Section 8c (5) (A) in this control pattern is certain. It provides the foundation upon which the Secretary of Agriculture charges the pool handlers in the marketing area with their actual utilization of the milk despite the fact that under Section 8c (5) (B), they pay the producer the uniform blend price. It in no way dictates equalized costs between pool handlers or between pool and non-pool handlers. This provision, coupled with the Producers Settlement Fund provides part of the mechanism to achieve the ultimate goal of the Act, stabilizing the producers market on the regional level. Consonant with that salutary, carefully wrought design, its only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area to determine the accountability of those handlers to the pool.

The final contentions of Lehigh and Sunerest are that the provisions for compensatory payments are not allowed by the Act and not supported by the record. As we have stated previously, the district court found the provisions "incidental to * * * and necessary to effectuate the other provisions of such order" under Section 8c (7) (D) of the Act and also found the provisions supported by the record. We agree with the district court's conclusion. 183 F. Supp. at pp. 89, 90. See also Lawson Milk Company v. Benson, supra, at pp. 72, 73.

The judgment of the district court will be reversed and the proceedings remanded to that court with instructions

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[8] Although admittedly Lehigh Valley Cooperative Farmers, Inc., is subject to another milk order, as we view Section 8c (5) (A) that has no bearing on its position concerning sales in the Order No. 27 area.

(1) to affirm the ruling and decision of the Judicial Officer in Lehigh Valley Cooperative Farmers, Inc. v. Benson, No. 13,290, and Suncrest Farms, Inc. v. Benson, No. 13,291; and (2) to issue an injunction as prayed for in the complaint in United States v. Lehigh Valley Cooperative Farmers, Inc., et al., No. 13,289 to require the appellees to comply with the terms of §§ 927.29(d) and 927.83 of the New York-New Jersey Milk Marketing Order for the payment of compensatory payments and to pay to the Market Administrator the money in the registry of the district court in this proceeding.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit